In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. 274

JOSEPH I. MOREALI,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, LOWELL FOODS, INC. and STATE COMPENSATION INSURANCE FUND;

Respondents.

PETITION FOR REHEARING

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Attorney for Petitioner, and, as amicus curiae, "America's Unofficial and Uncompensated Ombudsman" (as such, de facto, for 58 years and recognized as such by California's Governor's office, Speaker's office and the press), "Lincoln's Chief Aide" in the nation (by virtue of parenthood of the idea), "Candle Lighter" and "Champion of Justice and Scientific and Economical Government With a Heart", and, as all of such, representing all of the 200,000,000 people of the nation, who will be adversely affected, beyond repair, under the doctrine of stare decisis, if the "WRIT DENIED" is allowed to stand in this case in conflict with the just enunciated NEW RULES of the California Supreme Court on this entire subject.

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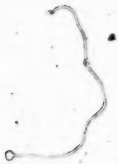

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INTERVENING CALIFORNIA SUPREME COURT DECISION MAKES REHEARING IMPERATIVE TO LIBERALIZE WORKMEN'S COMPENSATION LAWS OF ENTIRE NATION

Rule 58 of this Honorable Court, permits a PETITION FOR REHEARING in Certiorari cases in which there are "intervening circumstances of sub-

stantial or controlling effect (e.g., *Sanitary Refrigerator Co. v. Winters,* 280 U.S. 30, 34, footnote 1, 50 S. Ct. 9, 10; *Massey v. United States,* 291 U.S. 608, 54 S. Ct. 532), or other substantial grounds available to petitioner although not previously presented (e.g. *Schriber-Schroth Co. v. Cleveland Trust Co.,* 305 U.S. 47, 50, 59 S. Ct. 8, 9)".

BOTH phases of this rule have been lit up in neon lights in this case by the intervening (just available since the PETITION FOR WRIT OF CERTIORARI was denied herein on October 14, 1968) California Supreme Court 6 to 1 (Mr. Justice McComb alone dissenting) in bank *landmark* decision of October 4, 1968 in the California test case of *Granado v. Workmen's Compensation Appeals Board,* 69 Advance California Reports of October 18, 1968, Page 408 (referred to as pending on Pages 31 and 33 of the PETITION FOR WRIT OF CERTIORARI herein and on Pages 22, 25, 35 39, 45, 48, 53, 60 and 62 of our REPLY BRIEF), which new decision resolved ALL angles to the problems herein presented by decision of the State's highest court, which thereby AUTOMATICALLY BECAME BINDING on this Honorable Court under the doctrine of *Richfield Oil Corporation v. State Board of Equalization,* 329 U.S. 69, 84, 67 S. Ct. 908, 89 L. Ed. 1209 (1946), quoted on Pages 6 and 7 of our Petition herein that 'that construction is BINDING on us". (Emphasis added.)

In other words, the Supreme Court of California, by *interim decision,* since this matter was submitted, having spoken on EACH angle to this important test

case, its decision is binding on this High Court if the doctrine of the *Richfield* case is still the law of this land, and it is, unless a denial of this PETITION FOR REHEARING puts it in jeopardy.

Denial would, in addition, put in jeopardy the workmen's compensation laws of the entire nation since it would, in effect, be a repudiation of the California Supreme Court's liberal interpretation of the act and thus, under the doctrine of *stare decisis,* a binding precedent of reaction and Nineteenth Century barbarism for any who would test out any other state workmen's compensation law in the future, whereas a rehearing and subsequent granting of our writ in conformity with the California decision would stop all such possible litigation dead in its tracks, because the Supreme Court of our nation would then have spoken LOUD and CLEAR and it would have put its stamp of liberalism on every state law on the subject, including California's, so as to make its decision in this case the guiding light in the day-to-day enforcement of every workmen's compensation law in the nation, so that they will grind out JUSTICE and INSURED COMPENSATION instead of CREATING poverty all over the land by throwing the industrially injured, and their dependents, onto relief. Thus can our beloved Supreme Court IMPLEMENT, *at the judicial level,* my Ombudsman motto of "AN OUNCE OF PREVENTION OF POVERTY IS WORTH A POUND OF ITS CURE" more *efficaciously* and in *larger scope* than could any measure adopted at the legislative or administrative levels, state or federal.

Its decision would thus become one of the greatest, if not the greatest, decision ever rendered by it, and become the beacon light of progress in America toward governmental goals that make democracy work PROPERLY, so that government of, by and for the people shall not perish from the earth.

The intervening decision of California's highest court is the most clarifying and illuminating that has been handed down by that high court in this workmen's compensation field in the 33 years since it wrote the *Tanenbaum* decision (*Tanenbaum v. Industrial Accident Commission,* 4 Cal. 2nd 615, 617-8, 1935, the essential portion of which is set forth on Pages 18 and 19 of our REPLY BRIEF), which features and the basic rules laid down therein of (1) "INDUSTRY TAKES THE WORKMAN AS IT FINDS HIM", (2) "compensation is NOT to be denied merely because the *workman's physical condition* was such as to cause him to suffer a disability from an injury which *ordinarily,* given a *STRONGER* and HEALTHIER constitution, would have caused *little* or *no inconvenience*", and (3) "there is NO AUTHORITY for PRORATING the extent of disability due to the accident itself on the one hand and that due to the aggravation caused by the employee's physical condition on the other", have been the polar star of workmen's compensation ever since.

This polar star was dimmed when, in conformity with the administrative policy laid down in the press release of July 14, 1967, set forth in EXHIBIT A of our REPLY BRIEF, the respondent board denied

Granado *one-half* relief and *Moreali* ALL relief thereunder on the premise that there could be *"apportionment of temporary disability"*.

Comes now this landmark decision in *Granado* to the effect that this is NOT PROPER, which dispels all the darkness in this field, all the haze in front of the polar star of *Tanenbaum*. It illuminates all dark corners in the house of industrial disability, all gray areas, and puts everything in proper perspective, and for all time to come in California. The victory for progress and liberality in California's most sacred portion of the human rights structure—its LIVING room—is complete, the crusade of your Ombudsman for the objectives attained is ended, except for the mopping up operation in this case and the Wendell Phillips exhortation that *"Eternal vigilance is the price of liberty"*, which spells out the need of the legislative amendment set forth in our "EXHIBIT D" of our REPLY BRIEF (that in EXHIBIT C having been attained by *Granado*) so as to keep the enforcement liberal at the *administrative* level in order that it may be *meaningful* in ALL the hundreds of thousands of day-to-day cases, *not just those appealed to the courts.*

THE FRUITS OF VICTORY SHOULD FALL TO MOREALI

All this leaves Joe Moreali as the *step-child* of workmen's compensation as it exists today in perfected form by virtue of the *Granado* decision. He alone, of the 7,000,000 workers in California, must

eat the bitter fruits of Nineteenth Century justice that turns back the clock to the human industrial scrap-heaps we had at the turn of the century, before our 1911 and 1918 Amendments to our Constitution that guaranteed insured compensation to ALL injured in industry.

To Joe Moreali alone those sacred amendments and the Workmen's Compensation Law, enacted pursuant thereto are absolutely meaningless. They help him not one whit and may as well be repealed as far as he is concerned unless the fruits of victory in the *Granado* case fall into his lap too, in addition to the other 6,999,999 in his group segment of our California population.

WHY? WHY? WHY?

Surely such a statement from one in the best position in California to know as having written the original draft of the bill Hiram Johnson got through as Governor and every Amendment to it in the two-decade period of 1918-1938 when he was with the State, as well as testing out every phase of it in the quarter-century just past in the courts and before the administrative body, demands great big "*WHY*" to get Joe Moreali's case in proper perspective before this Honorable Court.

The reasons, or rather, the lack of reasons, for his denial of justice under the Act and under the Constitutional Amendments which spawned it are *accentuated* by this landmark *Granado* decision just ren-

dered by the Supreme Court of California, and of which he is entitled to the windfall benefits since he happens to have come within the 25-day rule that not only *permits* it but MANDATES it *after* the Supreme Court of the State involved has *spoken* on the sole points at issue.

Moreali was denied the sacraments of the Constitution and the communion of the Act, not because of anything he did wrong to disqualify him and his family from enjoying its benefits, but because of the NOW OUTLAWED attempt to deny the benefits of the act to those not in prime physical condition by saying that *temporary* disability *could be apportioned* so as to apportion him out of court with a ZERO percentage of industrial disability on the basis of the ONLY medical evidence in the case given by the *only two doctors* involved, which is that found on Page 44 of our Petition of the consolidated report of Dr. Giampaoli as follows:

> "It was certainly obvious that this man had a bunion or more technically hallus valgus of the left foot. I am positive that it is strictly developmental in nature. However, I have been seeing Mr. Moreali for *five and one-half years at relatively frequent intervals* and I do not recall that he has *ever complained of any discomfort of his left foot.* After having *bumped the foot* he had, and I *quote* from DR. JOSEPHSON'S report, 'IMMEDIATE SWELLING AND A GREAT DEAL OF PAIN. THERE SEEMED TO BE AN INCREASE OF FLUID WITHIN THE JOINT.' It is *obvious* from the *history alone* that the injury AGGRAVATED his pre-existing de-

> fect and therefore it is hard for me to see how this injury CAN BE ANYTHING OTHER THAN INDUSTRIAL." (Emphasis added.)

This consolidated report tells the WHOLE STORY now that our Supreme Court has outlawed the attempted proration or apportionment between the industrial injury and the preexisting condition. There is nothing that can be added to detract from THESE SIMPLE FACTS OF INJURY that was ruled industrial by the referee and respondent board. The FACTS speak for themselves under the *new ruling* of our State court and certainly the LEGAL CONCLUSION that the opposing doctor drew *from them*, that the operation that followed to enable the injured worker *to put his shoe on* and *go back to the work* was *non-industrial* and that the "question of trauma lighting up his particular condition" was not to enter into the picture (see his report, or self-proclaimed "decision", on Page 18 of our Petition), was OUTLAWED by the NEW RULING of our State's high court that such *"lighting up"* MUST be considered and must be considered binding since there can be no prorating or apportionment of *temporary disability* under it, in other words, the injury becomes automatically industrial once the LIGHTING UP was proved, as it was here, which makes EVERYTHING ELSE in the case IRRELEVANT, INCOMPETENT and IMMATERIAL under this now IRONCLAD rule emanating from our State Supreme Court since this matter was submitted, which thereby becomes binding upon this High Court under the doctrine of

Richfield Oil Corporation case discussed above and quoted on Page 6 of our Petition. So simplified has this case become under this new ruling of our State's highest court, and we can but ask that this Honorable Court respect its decision and implement it under the Federal rule by granting our PETITION FOR RE-HEARING on the basis thereof.

For this High Court's reference in this regard the paragraph in the State's high court decision which makes such a granting mandatory under Federal rulings, reads as follows:

> "In view of the ambiguity in the statute, the rule of liberal construction, the delays which will necessarily result if temporary disability is made apportionable, the resulting frustration of the legislative policy of making temporary disability a substitute for lost wages, and our public policy of expeditious payment, WE CONCLUDE THAT TEMPORARY DISABILITY IS NOT APPORTIONABLE." (Page 415 of the decision —Emphasis added.)

This rule was NOT applied to *Joe Moreali*. He is a citizen on a basis of equality with *Henry Granado* under the "EQUAL JUSTICE UNDER LAW" fundamental motto of the United States Supreme Court. He is *entitled* to that EQUALITY under the 25-day rule and we respectfully submit that a denial of that equality would be a violation of the Constitution of the United States by the Supreme Court itself.

STATE SUPREME COURT IN INTERVENING LANDMARK DECISION OPENS UP OTHER AVENUES OF RELIEF FROM THE "PETITION DENIED"

The intervening decision of the California Supreme Court in the *Granado* landmark case opens up another avenue of approach to the basic problem here involved which comes under both phases of Rule 58 so as to entitle your Petitioner to relief by way of Rehearing, which avenue is two-pronged, one that the Board *failed to state the evidence* on which it relied, which was NON-EXISTENT in that instant case, so as to make it IMPOSSIBLE to state it, and the other that a LEGAL CONCLUSION *cannot be substituted for such evidence.*

The exact language of the Court as to these new grounds, brought into the *Granado* case on the Court's *own initiative,* so as to be *unanticipatory,* is as follows:

> "The decision must be annulled for another reason.
>
> "The board in any decision on reconsideration altering or amending an order or award is required to state the evidence relied upon and specify *in detail* the *reasons* for that decision in order to *assist the reviewing court* in ascertaining the *principles relied* upon by the board, to help the board *avoid* CARELESS or ARBITRARY action, and to make the right of review MEANINGFUL. (*Labor Code,* Section 5908.5; *Evans v. Workmen's Compensation Appeals Board,* 68 Cal. 2d 791, 793 (68 Cal. Rep. 825, 441 P. 2d 633.)
>
> "In ordering apportionment, the board relied upon the evidence before it generally and the report of Dr. Robert R. McIvor. . . .

"The general statement of the board that it relies upon the evidence before it does not comply with the requirements of Section 5908.5 of the Labor Code and must be disregarded. In none of Dr. McIvor's reports does he state that the disability or any part of it is due to the normal progress of the preexisting injury. (*Zemke v. Workmen's Comp. App. Bd., supra,* 68 Cal. 2d 835, 840, et seq.; *Berry v. Workmen's Comp. App. Bd., supra,* 68 Cal. 2d 829, 831 et seq.)

"The decision of the Workmen's Compensation Board is annulled." (Emphasis added.)

The full wording of the Labor Code section relied upon by the Court, which makes the section applicable to the case here at issue, is as follows:

"Section 5908.5. Any decision of the appeals board *granting or denying a petition for reconsideration or affirming,* rescinding, altering, or amending the original findings, order, decision, or award following reconsideration shall be made by the appeals board and not by a referee and shall be in writing, signed by a majority of the appeals board members assigned thereto, and shall state the evidence relied upon and specify in detail the reasons for the decision." (Emphasis added.)

The entire difficulty in this case is due to the Board's violation of this section and the rules laid down in this new case of *Granado* implementing it. It could not have complied with the law's mandate or the Court's directive since it had ABSOLUTELY no evidence on which it could rely and to have stated that it was intentionally ignoring as the "deciding" doctor whose "decision" it approved, did, the basic

"industry takes the workman as it finds him" and "lighting up" rules would have brought the instant condemnation of the courts and a "decision annulled" ruling.

Instead of thus enlightening or "assisting the reviewing court in ascertaining the PRINCIPLES relied upon by the board, to help the board avoid CARELESS or ARBITRARY action and to make the *right of review* MEANINGFUL", it is stated, in so many words, that it was intentionally *disregarding* ALL the *evidence* in the case as the "*question* is an ESOTERIC one, SOLELY to be *answered* by an *expert* and NOT a *question of fact finding*". (See BOARD ORDER DENYING RECONSIDERATION on Page 13 of our Petition and REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION on Page 14 thereof.)

Surely, under the circumstances of the spelled out in black and white reasoning of the Board that it was turning its decision-making function over to the doctor for his "SOLE" decision on "ESOTERIC" material only, followed by the doctor's admission that his decision was a "GUESS" only, even though an "*educated*" one, but one which he could not make without "ASSUMING SUFFICIENT OMNIPOTENCE" and, in making it, did not even consider the question of *trauma* LIGHTING UP his particular condition" (See Page 18 of Petition for these unbelievable exact words), can but condemn that "decision" as a "LEGAL CONCLUSION" on the part of a doctor untrained in the law and thus incompetent to make a

"DECISION" on a point of law as required by *Tanenbaum* as to its "lighting up" feature and as required by this new epochal ruling of *Granado* that BARS the *prorating* or *apportionment* the doctor made of "*one hundred per cent NON-industrial,* even though he admitted in his written report that, after the Board-ruled industrial trauma, there was "IMMEDIATE SWELLING and a GREAT DEAL OF PAIN. There seemed to be an INCREASE OF FLUID WITHIN THE JOINT". This quotation is from his report by Dr. Giampaoli, who correctly ruled therefrom that this "LIGHTING UP" made the injury *industrial,* but whose ruling was too legalistic for the Board which was not looking for a factual conclusion based on the *evidence,* which it was by law, reinforced by this new *Granado* decision, bound to do, but on an ESOTERIC legal conclusion based solely on ASSUMED OMNIPOTENCE and not the fact of a 13-year totally quiescent and totally asymptomatic bunion, that had not caused one provable minute's loss of work in that almost decade and a half, being lit up and activated into a disabling injury, which activation got so bad within the space of a month that he couldn't even put his shoe on much less work on the painful foot, which is the very thing this new *Granado* decision INTERDICTS the *proration* of and MANDATES the *FULL* compensability of on the three grounds above stated of "no *proration* or *apportionment* of *temporary* disability", *guidelines* for the courts, including our highest, in reviewing board decisions and no decisions based on *"legal conclusions".*

All three of these new criteria of board conduct were violated in the instant case and we therefore respectfully contend that, being within the 25-day rule to benefit by a State court decision declaring the meaning of the state statute, and which construction has the force of law and is binding on this High Court under the doctrine of *Richfield* (*supra*), we should have our PETITION FOR REHEARING granted on at least one or more if not all three of the new grounds opened up to us by the State's highest court's construction of rights of industrially injured workers in a case which spanned all three points here at issue.

A fourth point is also brought out in the *Granado* case which is germane here, that of *mandated* LIBERAL CONSTRUCTION of the statute here under review. Its language in this regard is as follows:

> "The legislative COMMAND is that workmen's compensation laws shall be *liberally construed* 'with the purpose of *extending their benefits* for the *protection* of *persons injured* in the course of their employment.' (Labor Code, Section 3202.) here provisions of such laws are susceptible of an interpretation either beneficial or detrimental to injured employees or an ambiguity appears, they MUST be construed favorably to the employees. (E.g., *Colonial Ins. Co. v. Industrial Acc. Com.*, 27 Cal. 2d 437, 442 (164 P. 2d 490.)" (Emphasis added.)

This liberal construction is therefore mandatory upon this High Court under the *Richfield* decision. This construction we have not had in the instant case

in spite of the recognized liberality of this Honorable Court, Attorney General Ramsey Clark going so far as to say over the air recently that it is the "one institution that has moved UNFALTERINGLY toward equal justice for all". *As matters stand today this is no longer true.* It *"faltered"* on *Moreali,* and as a result millions of workmen all over the nation standing on his guinea-pig feet will be adversely affected in one of their most precious rights—the right to the necessities of life itself while industrially disabled—for themselves and their loved ones, for the very situation your Ombudsman expressed a fear of on Pages 24 and 25 of our REPLY BRIEF has actually come to pass, wherein the State Court, in terms of liberality, has set aside a comparable Board decision on the four basic grounds mentioned above and our nation's highest court has *upheld* REACTION and *turned back the hands of the clock* to the NINETEENTH CENTURY in this most vital area of the structure of human rights—its LIVING room —so as to throw Joe Moreali and the millions of workers he represents in this test case, onto the human industrial scrap heaps we humanitarians of the Hiram Johnson era thought we had abolished forever in California, and their dependents onto State Aid to Needy Disabled, State Aid to Needy Children and other forms of public charity, so as to CREATE, by binding court edict of the highest court of our nation, the very poverty its citizens are trying to abolish.

TIME TO CONVERT GRAVE ERROR INTO PROGRESS FOR HUMAN RIGHTS

There is yet time to correct this grave injustice, this denial of equal protection, this denial of due process, and put the highest court of the nation in conformity with the highest court of the state in which this litigation arose, so that it will not end with overruling of the State's salutary decision which it will, in effect, do if if tears up its decision in the *Richfield* case and defies the *four* rulings of the State's highest court that decision makes binding on it. That would leave the laws NATIONALLY under a *cloud of doubt,* with textbook writers and commentators *arguing* as to the exact state of the law on this vital subject that affects the daily lives of millions of men and women, whereas a decision *in conformity with* the four finding rules enunciated by the State Supreme Court in the field will SET ALL DOUBT AT REST and stabilize the law not only for California but for *all the nation* in this first case of real import ever to come before this High Court in this vital field of human rights, in which it cannot afford to "FALTER", since the decision will be indelible and its impact will be felt by generations yet unborn, who may have to relitigate this entire matter to resolve the doubt if this Honorable Court takes a reactionary stand and slaps our liberal California Court in the face in a binding precedent that cannot be erased from the decision records and will be available to any reactionary who might want to bend a state law in

this field toward regression of human rights, as the Respondent Board did in California and got away with it (so far) in *Moreali* but was stopped dead in its tracks in *Granado* because we have a 6 to 1 liberal Supreme Court. The CHALLENGE OF THE DAY is therefore to a liberal United States Supreme Court (that may not always remain so) as to whether it will *negate* liberality in California, and thus throughout America in the unborn litigation it will encourage to clarify its ambiguous "REHEARING DENIED" stand, or will take up the torch for human rights in this bread-and-butter branch of it that gives people the right to LIVE, just as it has in less vital branches of it, and write in noble words of meaningful grandeur the rights of man to existence, with his loved ones, when industrial injury strikes, by a decision that will prevent the breakdown of workmen's compensation in any state of the Union, just as our beloved Supreme Court in California has done in preventing the breakdown of our precious law by an affirmation which the Supreme Court of this nation can amplify into a re-affirmation that can make the doctrines of its newest landmark case the law of the entire land, without question, without effort, without years of agitation and litigation to further congest court calendars, in one fell swoop of encompassing effect, that will make my work as the nation's unpaid and unofficial Ombudsman (who has spent $2,000.00 of his borrowed money and $6,000.00 of his borrowed time in bringing this case to the very peak of judicial pro-

cedure in America because of its importance to each of its 200,000,000 citizens) lighter by a victory gained for the entire nation, so that I can devote my limited time on earth at 75 to other fields that need plowing to produce a harvest for America's people, such as the disability insurance field, the field of simplification of court procedure and of our basic crime statutes, abolition of the bail evil and abolition of the animal rule of "preponderance of evidence" for children, by legislation and by other *Gault* cases and other *Moreali* cases that I will lay on the doorstep of our highest court if found necessary, as it was in this *Moreali* case when my own Supreme Court turned me down for some mysterious reason and I had to apply here for relief. I plead for this relief on bended knee, as deserved, as mandatory and as Constitution-violating if it fails to come. May I start my seventh nation-wide tour as America's Ombudsman on the first of the year (beginning with the California law schools) on an affirmative stance of one big battle for human rights won and only 13 to go as I attempt to spur these law students on to crusading vigor to give "increased devotion to the great unfinished task remaining before us" of making democracy work PROPERLY, as it will, *perfectly,* in the field before this Honorable Court if it will but give its "AMEN" to the most important decision in it in 33 years and that could be this Honorable Court's most important ever rendered on human rights? Only the 9 Justices of this Honorable Court have the answer to this question. May it be in favor of the people of America I seek to serve and

not a heartless "REHEARING DENIED" that will defy description in its devastating effect.

Dated, San Francisco, California,
October 30, 1968.

Respectfully submitted,

ARTHUR L. JOHNSON,

Attorney for Petitioner, and as amicus curiae, America's Unofficial and Uncompensated Ombudsman, Lincoln's Chief Aide in Making Democracy Work PROPERLY, Candle Lighter, Torch Bearer and Champion of Justice and Scientific and Economical Government With a Heart, and, in all these capacities, representing all of the 200,000,000 people of the nation, who will be irreparably damaged in this group test case on behalf of humanity in general unless a Rehearing is granted herein.

CERTIFICATE OF COUNSEL

I hereby certify that this PETITION FOR REHEARING in the case of Joseph I. Moreali v. Workmen's Compensation Appeals Board, No. 274, is presented in good faith and not for delay, and that it is restricted to the two grounds specified for petitions for rehearing of orders on petitions for writs of certiorari under Paragraph 2 of Rule 58 of this Honorable Court.

ARTHUR L. JOHNSON,
Attorney for Petitioner.